BORK NOMINATION

GENERAL OVERVIEW

- Judge Robert Bork is one of the most qualified individuals ever nominated to the Supreme Court. He is a preeminent legal scholar; a practitioner who has argued and won numerous cases before the Supreme Court; and a judge who for five years has been writing opinions that faithfully apply law and precedent to the cases that come before him.

- As Lloyd Cutler, President Carter's Counsel, has recently said: "In my view, Judge Bork is neither an idealogue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues....The essence of [his] judicial philosophy is self-restraint." Mr. Cutler, one of the nation's most distinguished lawyers and a self-described "liberal democrat and...advocate of civil rights before the Supreme Court," compared Judge Bork to Justices Holmes, Brandeis, Frankfurter, Stewart, and Powell, as one of the few jurists who rigorously subordinate their personal views to neutral interpretation of the law.

- As a member of the Court of Appeals, Judge Bork has been solidly in the mainstream of American jurisprudence.

  - Not one of his more than 100 majority opinions has been reversed by the Supreme Court.

  - The Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined.

  - In his five years on the bench, Judge Bork has heard hundreds of cases. In all of those cases he has written only 9 dissents and 7 partial dissents. When he took his seat on the bench, 7 of his 10 colleagues were Democratic appointees, as are 5 of the 10 now. He has been in the majority in 94 percent of the cases he has heard.

  - The Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed. Justice Powell, in particular,

has agreed with Judge Bork in 9 of 10 cases that went to the Supreme Court.

- Judge Bork has compiled a balanced record in all areas of the law, including the First Amendment, civil rights, labor law, and criminal law. In fact, his views on freedom of the press prompted scathing criticism from his more conservative colleague, Judge Scalia.

- Some have expressed the fear that Judge Bork will seek to "roll back" many existing judicial precedents. There is no basis for this view in Judge Bork's record. As a law professor, he often criticized the reasoning of Supreme Court opinions; that is what law professors do. But as a judge, he has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court. Consequently, he is almost always in the majority on the Court of Appeals and has never been reversed by the Supreme Court. Judge Bork understands that in the American legal system, which places a premium on the orderly development of the law, the mere fact that one may disagree with a prior decision does not mean that that decision ought to be overruled.

- Judge Bork is the leading proponent of "judicial restraint." He believes that judges should overturn the decisions of the democratically-elected branches of government only when there is warrant for doing so in the Constitution itself. He further believes that a judge has no authority to create new rights based upon the judge's personal philosophical views, but must instead rely solely on the principles set forth in the Constitution.

- Justice Stevens, in a speech before the Eighth Circuit Judicial Conference, stated his view that Judge Bork was "very well qualified" to be a Supreme Court Justice. Judge Bork, Justice Stevens explained, would be "a welcome addition to the Court."

QUALIFICATIONS

Any one of Judge Robert Bork's four positions in private practice, academia, the Executive Branch or the Judiciary would have been the high point of a brilliant career, but he has managed all of them. As The New York Times stated in 1981, "Mr. Bork is a legal scholar of distinction and principle."

- Professor at Yale Law School for 15 years; holder of two endowed chairs; graduate of the University of Chicago Law School, Phi Beta Kappa and managing editor of the Law Review.

- Among the nation's foremost authorities on antitrust and constitutional law. Author of dozens of scholarly works, including The Antitrust Paradox, a leading work on antitrust law.

- An experienced practitioner and partner at Kirkland & Ellis.

- Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.

- Unanimously confirmed by the Senate for the D.C. Circuit in 1982, after receiving the ABA's highest rating-- "exceptionally well qualified"--which is given to only a handful of judicial nominees each year.

- As an appellate judge, he has an outstanding record: not one of his more than 100 majority opinions has been reversed by the Supreme Court.

- The Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed. For example, in Sims v. CIA, Judge Bork criticized a panel opinion which had impermissibly, in his view, narrowed the circumstances under which the identity of confidential intelligence sources could be protected by the government. When the case was appealed, all nine members of the Supreme Court agreed that the panel's definition of "confidential source" was too narrow and voted to reverse.

GENERAL JUDICIAL PHILOSOPHY

Judge Bork has spent more than a quarter of a century refining a careful and cogent philosophy of law.

- His judicial philosophy begins with the simple proposition that judges must apply the Constitution, the statute, or controlling precedent--not their own moral, political, philosophical or economic preferences.

- He believes in neutral, text-based readings of the Constitution, statutes and cases. This has frequently led him to take positions at odds with those favored by

political conservatives. For example, he testified before the Senate Subcommittee on Separation of Powers that he believed the Human Life Bill to be unconstitutional; he has opposed conservative efforts to enact legislation depriving the Supreme Court of jurisdiction over issues like abortion and school prayer; and he has publicly criticized conservatives who wish the courts to take an active role in invalidating economic regulation of business and industry.

- He is not a political judge: He has repeatedly criticized politicized, result-oriented jurisprudence of either the right or the left.

- Judge Bork believes that there is a presumption favoring democratic decisionmaking, and he has demonstrated deference to liberal and conservative laws and agency decisions alike.

- He has repeatedly rebuked academics and commentators who have urged conservative manipulation of the judicial process as a response to liberal judicial activism.

- Judge Bork believes judges are duty-bound to protect vigorously those rights enshrined in the Constitution. He does not adhere to a rigid conception of "original intent" that would require courts to apply the Constitution only to those matters which the Framers specifically foresaw. To the contrary, he has written that it is the "task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." His opinions applying the First Amendment to modern broadcasting technology and to the changing nature of libel litigation testify to his adherence to this view of the role of the modern judge.

- He believes in abiding by precedent: he testified in 1982 regarding the role of precedent within the Supreme Court:

> I think the value of precedent and of certainty and of continuity is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.

He also has said that even questionable prior precedent ought not be overturned when it has become part of the political fabric of the nation.

- As The New York Times said in a December 12, 1981, editorial endorsing his nomination to our most important appellate court in 1981:

> Mr. Bork...is a legal scholar of distinction and principle....One may differ heatedly from him on specific issues like abortion, but those are differences of philosophy, not principle. Differences of philosophy are what the 1980 election was about; Robert Bork is, given President Reagan's philosophy, a natural choice for an important judicial vacancy.

FIRST AMENDMENT

- During his five years on the bench, Judge Bork has been one of the judiciary's most vigorous defenders of First Amendment values.

- He has taken issue with his colleagues, and reversed lower courts, in order to defend aggressively the rights of free speech and a free press. For example:

  - In Ollman v. Evans and Novak, Judge Bork greatly expanded the constitutional protections courts had been according journalists facing libel suits for political commentary. Judge Bork expressed his concern that a recent and dramatic upsurge in high-dollar libel suits threatened to chill and intimidate the American press, and held that those considerations required an expansive view of First Amendment protection against such suits.

    Judge Bork justified his decision as completely consistent with "a judicial tradition of a continuing evolution of doctrine to serve the central purpose" of the First Amendment. This reference to "evolution of doctrine" provoked a sharp dissent from Judge Scalia, who criticized the weight Judge Bork gave to "changed social circumstances". Judge Bork's response was unyielding: "It is the task of the judge in this generation to discern how the framer's values, defined in the context of the world they knew, apply to the world we know."

    Judge Bork's decision in this case was praised as "extraordinarily thoughtful" in a New York Times column authored by Anthony Lewis. Lewis further described the opinion as "too rich" to be adequately summarized in his column. Libel lawyer Bruce Sanford

said, "There hasn't been an opinion more favorable to the press in a decade."

- In McBride v. Merrell Dow and Pharmaceuticals Inc., Judge Bork stressed the responsibility of trial judges in libel proceedings to ensure that a lawsuit not become a "license to harass" and to take steps to "minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." Judge Bork emphasized that even if a libel plaintiff is not ultimately successful, the burden of defending a libel suit may itself in many cases unconstitutionally constrain a free press. He wrote: "Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits--particularly those bordering on the frivolous--should be controlled so as to minimize their adverse impact upon press freedom."

- In Lebron v. Washington Metropolitan Area Transit Authority, Judge Bork reversed a lower court and held that an individual protestor had been unconstitutionally denied the right to display a poster mocking President Reagan in the Washington subway system. Judge Bork characterized the government's action in this case as a "prior restraint" bearing a "presumption of unconstitutionality." Its decision to deny space to the protestor, Judge Bork said, was "an attempt at censorship," and he therefore struck it down.

- Judge Bork's record indicates he would be a powerful ally of First Amendment values on the Supreme Court. His conservative reputation and formidable powers of persuasion provide strong support to the American tradition of a free press. Indeed, precisely because of that reputation, his championing of First Amendment values carries special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.

- In 1971 Judge Bork wrote an article suggesting that the First Amendment is principally concerned with protecting political speech. It has been suggested that this might mean that Bork would seek to protect only political speech. But Judge Bork has repeatedly made his position on this issue crystal clear: in a letter published in the ABA Journal in 1984, for

example, he said that "I do not think...that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative....As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection." He also testified before Congress to this effect in 1982. He has made unmistakably clear his view that the First Amendment itself, as well as Supreme Court precedent, requires vigorous protection of non-political speech.

- On the appellate court, Judge Bork has repeatedly issued broad opinions extending First Amendment protection to non-political speech, such as commercial speech (FTC v. Brown and Williamson Tobacco Corp.), scientific speech (McBride v. Merrell Dow and Pharmaceuticals, Inc.) and cable television programming involving many forms of speech (Quincy Cable Television v. FCC).

CIVIL RIGHTS

- As Solicitor General, Judge Bork was responsible for the government arguing on behalf of civil rights in some of the most far-reaching civil rights cases in the Nation's history, sometimes arguing for more expansive interpretations of the law than those ultimately accepted by the Court.

- Among Bork's most important arguments to advance the civil rights of minorities were:

  - Beer v. United States -- Solicitor General Bork urged a broad interpretation of the Voting Rights Act to strike down an electoral plan he believed would dilute black voting strength, but the Court disagreed 5-3.

  - General Electric Co. v. Gilbert -- Bork's amicus brief argued that discrimination on the basis of pregnancy was illegal sex discrimination, but six justices, including Justice Powell, rejected this argument. Congress later changed the law to reflect Bork's view.

  - Washington v. Davis -- The Supreme Court, including Justice Powell, rejected Bork's argument that an employment test with a discriminatory "effect" was unlawful under Title VII.

- Teamsters v. United States -- The Supreme Court, including Justice Powell, ruled against Bork's argument that even a wholly race-neutral senority system violated Title VII if it perpetuated the effects of prior discrimination.

- Runyon v. McCrary -- Following Bork's argument, the Court ruled that civil rights laws applied to racially discriminatory private contracts.

- United Jewish Organization v. Carey -- The Court agreed with Bork that race-conscious redistricting of voting lines to enhance black voting strength was constitutionally permissible.

- Lau v. Nichols -- This case established that a civil rights law prohibited actions that were not intentionally discriminatory, so long as they disproportionately harmed minorities. The Court later overturned this case and narrowed the law to reach only acts motivated by a discriminatory intent.

- As a member for five years of the United States Court of Appeals for the D.C. Circuit, Judge Bork has compiled a balanced and impressive record in the area of civil rights.

- He often voted to vindicate the rights of civil rights plaintiffs, frequently reversing lower courts in order to do so. For example:

  - In Palmer v. Shultz, he voted to vacate the district court's grant of summary judgment to the government and hold for a group of female foreign service officers alleging State Department discrimination in assignment and promotion.

  - In Ososky v. Wick, he voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system.

  - In Doe v. Weinberger, he voted to reverse the district court and hold that an individual discharged from the National Security Agency for his homosexuality had been illegally denied a right to a hearing.

  - In County Council of Sumter County, South Carolina v. United States, Judge Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act. He later held that the County

had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

- In Norris v. District of Columbia, Judge Bork voted to reverse a district court in a jail inmate's Section 1983 suit against four guards who allegedly had assaulted him. Judge Bork rejected the district court's reasoning that absent permanent injuries the case must be dismissed; the lawsuit was thus reinstated.

- In Laffey v. Northwest Airlines, Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its female employees.

- In Emory v. Secretary of the Navy, Judge Bork reversed a district court's decision to dismiss a claim of racial discrimination against the United States Navy. The District Court had held that the Navy's decisions on promotion were immune from judicial review. In rejecting the district court's theory, Judge Bork held: "Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated."

- Judge Bork has rejected, however, claims by civil rights plaintiffs when he has concluded that their arguments were not supported by the law. For example:

  - In Paralyzed Veterans of America v. Civil Aeronautics Board, Judge Bork criticized a panel decision which had held that all the activities of commercial airlines were to be considered federal programs and therefore subject to a statute prohibiting discrimination against the handicapped in federal programs. Judge Bork characterized this position as flatly inconsistent with Supreme Court precedent. On appeal, the Supreme Court adopted Judge Bork's position and reversed the panel in a 6-3 decision authored by Justice Powell.

  - In Vinson v. Taylor, Judge Bork criticized a panel decision in a sexual harassment case, both because of evidentiary rulings with which he disagreed and because the panel had taken the position that employers were automatically liable for an

employee's sexual harassment, even if the employer had not known about the incident at issue. The Supreme Court on review adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability.

- In Dronenberg v. Zech, Judge Bork rejected a constitutional claim by a cryptographer who was discharged from the Navy because of his homosexuality. Judge Bork held that the Constitution did not confer a right to engage in homosexual acts, and that the court therefore did not have the authority to set aside the Navy's decision. He wrote: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court." The case was never appealed, but last year the Supreme Court adopted this same position in Bowers v. Hardwick--a decision in which Justice Powell concurred.

- In Hohri v. United States, Judge Bork criticized a panel opinion reinstating a claim by Americans of Japanese descent for compensation arising out of their World War II internment. Judge Bork denounced the internment, but pointed out that in his view the Court of Appeals did not have statutory authority to hear the case. He characterized the panel opinion as one in which "compassion displaces law." In a unanimous opinion authored by Justice Powell, the Supreme Court adopted Judge Bork's position and reversed the panel on appeal.

- Judge Bork has never had occasion to issue a ruling in an affirmative action case. While a law professor, he wrote an op-ed piece in 1979 for The Wall Street Journal in which he criticized the recently issued Bakke decision. Since then, however, the Supreme Court has issued many other decisions affecting this issue, and Judge Bork has never in any way suggested that he believes this line of cases should be overruled.

- In 1963 Bork wrote an article in the New Republic criticizing proposed public accommodations provisions that eventually became part of the Civil Rights Act as undesirable legislative interference with private business behavior.

  - But ten years later, at his confirmation hearings for the position of Solicitor General, Bork acknowledged that his position had been wrong:

> I should say that I no longer agree with that article....It seems to me I was on the wrong track altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today, I would support it.

- The article was not even raised during his unanimous Senate confirmation to the D.C. Circuit ten years later, in 1982.

- His article, as does his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument."

LABOR

- Judge Bork's approach to labor cases illustrates his deep commitment to principled decisionmaking. His faithful interpretation of the statutes at issue has resulted in a balanced record on labor issues that defies characterization as either "pro-labor" or "pro-management."

- He has often voted to vindicate the rights of labor unions and individual employees both against private employers and the federal government.

  - In an opinion he authored for the court in United Mine Workers of America v. Mine Safety Health Administration, Judge Bork held on behalf of the union that the Mine Safety and Health Administration could not excuse individual mining companies from compliance with a mandatory safety standard, even on an interim basis, without following particular procedures and ensuring that the miners were made as safe or safer by the exemption from compliance.

  - In concurring with an opinion authored by Judge Wright in Amalgamated Clothing and Textile Workers v. National Labor Relations Board, Judge Bork held that despite evidence that the union, at least in a limited manner, might have engaged in coercion in a very close election that the union won, the National Labor Relations Board's decision to certify the union should not be overturned nor a new election ordered.

  - In Musey v. Federal Mine Safety and Health Review Commission, Judge Bork ruled that under the Federal

Coal Mine and Health and Safety Act the union and its attorneys were entitled to costs and attorney fees for representing union members.

- In Amalgamated Transit Union v. Brock, Judge Bork, writing for the majority, held in favor of the union that the Secretary of Labor had exceeded his statutory authority in certifying in federal assistance applications that "fair and equitable arrangements" had been made to protect the collective bargaining rights of employees before labor and management had actually agreed to a dispute resolution mechanism.

- In United Scenic Artists v. National Labor Relations Board, Judge Bork joined an opinion which reversed the Board's determination that a secondary boycott by a union was an unfair labor practice, holding that such a boycott occurs only if the union acts purposefully to involve neutral parties in its dispute with the primary employer.

- Similar solicitude for the rights of employees is demonstrated by Northwest Airlines v. Airline Pilots International, where Bork joined a Judge Edwards' opinion upholding an arbitrator's decision that an airline pilot's alcoholism was a "disease" which did not constitute good cause for dismissal.

- Another opinion joined by Judge Bork, NAACP v. Donovan, struck down amended Labor Department regulations regarding the minimum "piece rates" employers were obliged to pay to foreign migrant workers as arbitrary and irrational.

- A similar decision against the government was rendered in National Treasury Employees Union v. Devine, which held that an appropriations measure barred the Office of Personnel Management and other agencies from implementing regulations that changed federal personnel practices to stress individual performance rather than seniority.

- In Oil Chemical Atomic Workers International v. National Labor Relations Board, Judge Bork joined another Edwards' opinion reversing NLRB's determination that a dispute over replacing "strikers" who stopped work to protest safety conditions could be settled through a private agreement between some of the "strikers" and the company because of the public interest in ensuring substantial remedies for unfair labor practices.

- In Donovan v. Carolina Stalite Co., Judge Bork reversed the Federal Mine Safety and Health Review Commission, holding that a state gravel processing facility was a "mine" within the meaning of the Act and thus subject to civil penalties.

- Black v. Interstate Commerce Commission, a per curiam opinion joined by Judge Bork, held that the ICC had acted arbitrarily and capriciously in allowing a railroad to abandon some of its tracks in a manner that caused the displacement of employees of another railroad.

- Where the statute, legitimate agency regulation, or collective bargaining agreement so dictated, however, he has not hesitated to rule in favor of the government or private employer.

  - In National Treasury Employees Union v. U.S. Merit Systems, Judge Bork held that seasonal government employees laid off in accordance with the conditions of their employment were not entitled to the procedural protections that must be provided to permanent employees against whom the government wishes to take "adverse action."

  - In Prill v. National Labor Relations Board, Judge Bork dissented from the panel to support the National Labor Relations Board decision that an employee's lone refusal to drive an allegedly unsafe vehicle was not protected by the "concerted activities" section of the National Labor Relations Act. Judge Bork concluded that the Board's definition of "concerted activities," which required that an employee's conduct must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself, was compelled by the statute.

  - In International Brotherhood of Electrical Workers v. National Labor Relations Board, Judge Bork wrote an opinion for the court upholding a National Labor Relations Board decision against the union which held that an employer had not committed an unfair labor practice by declining to bargain over its failure to provide its employees with a Christmas bonus. The court found that the company's longstanding practice to provide bonuses had been superseded by a new collective bargaining agreement which represented by its terms that it formed the sole basis of the employer's obligations to its employees and did not specify a Christmas bonus.

- In Dunning v. National Aeronautics and Space Administration, Judge Bork joined Judges Wald and Scalia in denying an employee's petition for review of a Merit Systems Protection Board decision to affirm a 15-day suspension imposed by NASA for insubordination.

CRIMINAL LAW

- As Solicitor General, Robert Bork argued and won several major death penalty cases before the United States Supreme Court. He has expressed the view that the death penalty is constitutionally permissible, provided that proper procedures are followed.

- Judge Bork is a tough but fairminded judge on criminal law issues.

- He has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to evade justice.

  - In United States v. Mount, for example, he concurred in a panel decision affirming a defendant's conviction for making a false statement in a passport application. He wrote a separate concurrence to emphasize that the court had no power to exclude evidence obtained from a search conducted in England by British police officers, and that even assuming that it did, it would be inappropriate for the court to apply a "shock the conscience" test.

  - In U.S. v. Singleton, he overruled a district court order that had suppressed evidence in a defendant's retrial for robbery which had been deemed reliable in a previous court of appeals review of the first trial.

- On the other hand, however, Judge Bork has not hesitated to overturn convictions when constitutional or evidentiary considerations require such a result.

  - In U.S. v. Brown, Judge Bork joined in a panel decision overturning the convictions of members of the "Black Hebrews" sect, on the ground that the trial court, by erroneously dismissing a certain juror who had questioned the sufficiency of the government's evidence, had violated the defendants' constitutional right to a unanimous jury. Judge Bork's decision to void nearly 400 separate verdicts in what is believed to be the longest and most

expensive trial ever held in a D.C. district court highlights his devotion to vindicating the constitutional rights even of criminal defendants.

ABORTION

- Judge Bork has never stated whether he would vote to overrule Roe v. Wade. Some have suggested, however, that Judge Bork ought not to be confirmed unless he commits in advance not to vote to overrule Roe v. Wade. Traditionally, judicial nominees do not pledge their votes in future cases in order to secure confirmation. This has long been regarded as clearly improper. Indeed, any judicial nominee who did so would properly be accused not only of lacking integrity, but of lacking an open mind.

- In 1981, Judge Bork testified before Congress in opposition to the proposed Human Life Bill, which sought to reverse Roe v. Wade by declaring that human life begins at conception. Judge Bork called the Human Life Bill "unconstitutional".

- Judge Bork has in the past questioned only whether there is a right to abortion in the Constitution.

- This view is shared by some of the most notable, mainstream and respected scholars of constitutional law in America:

  - Harvard Law Professors Archibald Cox and Paul Freund.

  - Stanford Law School Dean John Hart Ely.

  - Columbia Law Professor Henry Monaghan.

- Stanford law professor Gerald Gunther, the editor of the leading law school casebook on constitutional law, offered the following comments on Griswold v. Connecticut, the precursor to Roe v. Wade: "It marked the return of the Court to the discredited notion of substantive due process. The theory was repudiated in 1937 in the economic sphere. I don't find a very persuasive difference in reviving it for the personal sphere. I'm a card-carrying liberal Democrat, but this strikes me as a double standard."

- Judge Ruth Bader Ginsburg, one of Judge Bork's colleagues on the D.C. Circuit, has written that Roe v. Wade "sparked public opposition and academic

criticism...because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."

- The legal issue for a judge is whether it should be the court, or the people through their elected representatives, that should decide our policy on abortion.

- If the Supreme Court were to decide that the Constitution does not contain a right to abortion, that would not render abortion illegal. It would simply mean that the issue would be decided in the same way as virtually all other issues of public policy--by the people through their legislatures.

WATERGATE

- During the course of the Cox firing, Judge Bork displayed great personal courage and statesmanship. He helped save the Watergate investigation and prevent disruption of the Justice Department. As Lloyd Cutler has recently written, "[I]t was inevitable that the President would eventually find someone in the Justice Department to fire Mr. Cox, and, if all three top officers resigned, the department's morale and the pursuit of the Watergate investigation might have been irreparably crippled."

- At first, Bork informed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus that he intended to resign his position. Richardson and Ruckelshaus persuaded him to stay. As Richardson has recently said, "There was no good reason for him to resign, and some good reason for him not to." Richardson and Ruckelshaus felt that it was important for someone of Bork's integrity and stature to stay on the job in order to avoid mass resignations that would have crippled the Justice Department.

- After carrying out the President's instruction to discharge Cox, Bork acted immediately to safeguard the Watergate investigation and its independence. He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly told the Special Prosecutor's office that they had complete independence and that they should subpoena the tapes if they saw fit--the very action that led to Cox's discharge.

- Judge Bork framed the legal theory under which the indictment of Spiro Agnew went forward. Agnew had taken the position that a sitting Vice President was immune from criminal indictment, a position which President Nixon initially endorsed. Bork wrote and filed the legal brief arguing the opposite position, i.e. that Agnew was subject to indictment. Agnew resigned shortly thereafter.

- In 1981, The New York Times described Judge Bork's decisions during Watergate as "principled."

BALANCE ON THE SUPREME COURT

- Judge Bork's appointment would not change the balance of the Supreme Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. In every instance, Judge Bork's decisions are based on his reading of the statutes, constitutional provisions, and case law before him. A Justice who brings that approach to the Supreme Court will not alter the present balance in any way.

- The unpredictability of Supreme Court appointees is characteristic. Justice Scalia, a more conservative judge than Bork, has been criticized by some conservatives for his unpredictability in his very first term on the Court. Justice O'Connor has also defied expectations, as Professor Lawrence Tribe noted: "Defying the desire of Court watchers to stuff Justices once and for all into pigeonholes of 'right' or 'left,' [her] story...is fairly typical: when one Justice is replaced with another, the impact on the Court is likely to be progressive on some issues, conservative on others."

- There is no historical or constitutional basis for making the Supreme Court as it existed in June 1987 the ideal standard to which all future Courts must be held.

  - No such standard has ever been used in evaluating nominees to the Court. The record indicates that the Senate has always tried to look to the nominee's individual merits--even when they have disagreed about them.

  - The issue of "balance" did not arise with respect to FDR's eight nominations to the Court in six years or LBJ's nominees to the Warren Court, even though, as Professor Tribe has written, Justice Black's

appointment in 1937 "took a delicately balanced Court...and turned it into a Court willing to give solid support to F.D.R.'s initiatives. So, too, Arthur Goldberg's appointment to the Court... shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

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JUDGE BORK'S JUDICIAL PHILOSOPHY

Judge Bork's writings and judicial opinions illustrate his judicial philosophy that "[t]he courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority's legitimate right to govern." The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823 (1986). This means two things. First, a "judge fails in his judicial duty" if he "provides a crabbed interpretation that robs a [constitutional] provision of its full, fair and reasonable meaning." Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring). Second, a judge must view the Constitution as law -- "that the words [of the Constitution] constrain judgment" and "control judges every bit as much as they control legislators, executives and citizens." Bork points out that the specific provisions of the Constitution have limits. "They do not cover all possible or even all desirable liberties." "These limits mean that the judge's authority has limits and that outside the designated areas democratic institutions govern." 23 San Diego L. Rev. at 824-25.

I.

Judge Bork has repeatedly demonstrated his conviction that "courts must be energetic to protect the [constitutional] rights of individuals." This conviction is fully consistent with Judge Bork's view that judicial review is legitimate only "if judges interpret the [Constitution's] words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments." As James Madison stated:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone is it the legitimate Constitution. And if that not be the guide in expounding it, there can be no security for a consistent and stable, more than for fanciful exercise of its powers.

As Judge Bork points out, however, intentionalism "is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers," but that a judge must be fully willing "to deal with unforeseen threats to an established constitutional value." According to Judge Bork,

> all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That premise states a core value that the Framers intended to protect. The intentionalist judge must then supply the minor premise in

> order to protect the constitutional freedom in circumstances the Framers could not foresee. . . .

23 San Diego L. Rev. at 826-27.

Ollman v. Evans illustrates Judge Bork's application of a core constitutional value to changed circumstances. In Ollman, a Marxist history professor sued columnists Evans and Novak for making allegedly defamatory statements about him in a column, particularly, the statement that the professor was "without status" in his profession. Applying a four-factor test, a plurality of the en banc court concluded that under the Supreme Court's cases, the allegedly defamatory material deserved absolute protection under the first amendment because it constituted "opinion" rather than "fact."

Judge Bork wrote a separate concurring opinion, concluding that the plurality relied on a "rigid doctrinal framework . . . inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press." He believed instead that the context and totality of circumstances surrounding the statement about Professor Ollman's status in his profession made it clear that the remark amounted to constitutionally protected "rhetorical hyperbole" uttered in the course of political debate. Judge Bork's analysis was animated by a concern that "in the past few years, a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment would most certainly prohibit."

Judge Bork's opinion in Ollman was the subject of a scathing dissent by Judge (now Justice) Scalia, who criticized Judge Bork's attempt to adapt libel law to contemporary circumstances, stating that the concurring opinion had "embark[ed] upon an exercise of, as it puts it, constitutional 'evolution,' with very little reason and very uncertain effect upon the species." Judge Scalia insisted that concerns that developing libel law threatened freedom of the press were better left to legislatures.

Responding to Judge Scalia, Judge Bork wrote:

> In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy.

> The commerce power was established by men who did not foresee the scope and intricate interdependence of today's economic activities. But that does not make it wrong for judges to forbid states the power to impose burdensome regulations on the interstate movement of trailer trucks. The first amendment's guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the first amendment relevant to radio and television broadcasting.
>
> So it is with defamation actions. . . . Perhaps the framers did not envision libel actions as a major threat to that freedom. I may grant that, for the sake of the point to be made. But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines? Why is it different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media? I do not believe there is a difference. To say that such matters must be left to the legislature is to say that changes in circumstances must be permitted to render constitutional guarantees meaningless. . . .
>
> . . . The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint.

750 F.2d at 995-96.

Thus, the objection to Judge Bork's reliance on original intent cannot be that existing constitutional protections would be eroded. Plainly, they would not be. Rather, the objection must be that Judge Bork would be unwilling to invalidate laws to which the Constitution does not speak, but which the critics find objectionable.

II.

Although Judge Bork thus affords broad protection of those rights specified in the Constitution, he firmly believes that the Supreme Court acts illegitimately when it relies on personal preferences with no clear warrant in the text, history, or structure of the Constitution to invalidate laws made by the people's elected representatives. Bork terms the latter "judicial imperialism." Moreover, Bork rejects the claim that judicial imperialism, or noninterpretivism, is a means by which courts only add to, but never subtract from, constitutional freedoms:

> That is wrong. Among our constitutional freedoms or rights, clearly given in the text, is the power to govern ourselves democratically. Every time a court creates a new constitutional right against government or expands, without warrant, an old one, the constitutional freedom of citizens to control their lives is diminished. . . . The claim of noninterpretivists, then, that they will expand rights and freedoms is false. They will merely redistribute them.

The Struggle Over the Role of the Court, National Review 1137, 1139 (Sept. 17, 1982).

Bork's view that majorities are entitled to govern through democratic institutions when the Constitution is silent leads him to reject the creation of so-called "new rights" -- rights enforced against government in the name of the Constitution but which have no demonstrable connection with that document. This method of constitutional decisionmaking is commonly referred to as "substantive due process." Although the Supreme Court's decisions invalidating state laws as inconsistent with undefined, nontextual rights of "privacy" provide the clearest recent examples, Judge Bork has been equally critical of the Supreme Court's willingness in the past to invalidate federal and state economic regulations in the name of a substantive due process rights to economic liberty and property.

A. Privacy Rights

In 1971, Professor Bork criticized the Supreme Court's decision in Griswold v. Connecticut, 381 U.S. 479 (1965), invalidating Connecticut's ban on the use of contraceptives, on

the ground that the decision could not be justified in terms of the existing Constitution. Bork noted that a right to use contraceptive devices is not "covered specifically or by obvious implication in the Constitution." Accordingly, he concluded: "Where the Constitution does not embody a moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy." Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 14-15 (1971). Justice Black's dissent, joined by Justice Stewart, made precisely the same point:

> While I completely subscribe to the [view] that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.

381 U.S. at 513.

Bork's criticisms of Roe v. Wade, 410 U.S. 113 (1973), proceed along similar lines. In testifying against the Human Life Bill, Professor Bork stated that "Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority." Similarly, criticizing noninterpretivism in 1982, Bork stated, "I suppose the most striking example of [noninterpretivism] occurred in the era of the Burger Court, the supposedly conservative Court, with the decision in Roe v. Wade. The Court decided with no constitutional warrant that I can see, that the states' statutes regulating abortions were unconstitutional. Nobody has ever been able to locate any authority for a judge to do that in conventional constitutional materials." See The Legitimacy of the Supreme Court, An Interview with Robert H. Bork and Burke Marshall, in The Supreme Court and Human Rights 237, 239-41 (1982). Expressing a similar objection, Justice White, joined by Justice Rehnquist, dissented in Roe on the ground that there is "nothing in the language or history of the Constitution to support the Court's judgment," which he termed "an exercise of raw judicial power."

Many of the most respected constitutional law scholars have expressed profound disagreement with the reasoning and holding of Roe v. Wade, including Harvard Law School Professors Archibald

Cox and Paul Freund, Stanford Law School Dean John Hart Ely, and Columbia Law School Professor Henry Monaghan. Dean Ely, a former law clerk to Chief Justice Earl Warren, stated in 1973 that "what is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution, the Framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included or the nation's governmental structure." Similarly, Stanford Law School Professor Gerald Gunther, editor of the leading law school casebook on constitutional law, offered the following related comments on Griswold v. Connecticut: "It marked the return of the Court to the discredited notion of substantive due process. The theory was discredited in 1937 in the economic sphere. I don't find a very persuasive difference in reviving it for the personal sphere. I'm a card-carrying liberal Democrat, but this strikes me as a double standard."

As a circuit judge, Bork's approach to substantive due process is illustrated by his opinion, joined by Judge Scalia, in Dronenburg v. Zech, 731 F.2d 1388 (D.C. Cir. 1984), declining to extend the right to "privacy" to homosexual sodomy in the Navy. After a thorough review of the Supreme Court's privacy cases, Judge Bork concluded that the Court had neither stated nor applied a principle that would cover a right to engage in homosexual conduct. Citing Justice White's dissent in Moore v. City of East Cleveland, 431 U.S. 494 (1977), for the proposition that the creation of new constitutional rights "comes closest to illegitimacy" when judges make "law having little or no cognizable roots in the language or even the design of the Constitution," Judge Bork stated: "If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so." In addition, Judge Bork observed that both the absence of guidance from the Constitution or from articulated Supreme Court principle and the volume of lower court decisions that evade Supreme Court review counsel against the creation of new constitutional rights by lower courts. Judge Bork wrote:

> If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court.

Consistent with Judge Bork's decision in Dronenburg, the Supreme Court held two years later in an opinion joined by Justice Powell that the right to privacy does not confer upon homosexuals a fundamental right to engage in sodomy. See Bowers v. Hardwick, 106 S.Ct. 2847 (1986).

B. Liberty and Property Rights

Judge Bork's rejection of substantive due process and the creation of new constitutional rights, of course, includes rejection of economic rights not fairly indicated by the Constitution. For example, after discussing and criticizing the Court's decision and methodology in Griswold, Judge Bork rejected as equally illegitimate the invalidation of economic regulations under a generalized notion of laissez faire economic philosophy said by some to pervade the Constitution.

> As Judge Learned Hand understood, economic freedoms are philosophically indistinguishable from other freedoms. Judicial review would extend, therefore, to all economic regulations. The burden of justification would be placed on the government so that all such regulations would start with a presumption of unconstitutionality. Viewed from the standpoint of economic philosophy, and of individual freedom, the idea has many attractions. But viewed from the standpoint of constitutional structures, the idea works a massive shift away from democracy and toward judicial rule.

The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 829 (1986). Similarly, speaking of the recent right to privacy cases and the substantive economic due process decisions of the 1930's, Bork has stressed that "in both of these cases, there is no way anyone can point to a provision or a historical meaning of the Constitution which gives the Court any guidance in deciding those cases; therefore, the Court is legislating freely." The Legitimacy of the Supreme Court, at 241-42 (1982).

Just as Judge Bork's rejection of the privacy cases leads him to reject the substantive economic due process decisions of the 1930's, one who advocates judicial creation of new constitutional rights must be prepared to accept the creation of right with which he disagrees. By definition, such rights are not limited by the text of the Constitution, and therefore there is no means other than the individual preferences of the justices for distinguishing among nontextual rights. Thus, those who insist that Judge Bork should embrace the creation of new rights must be prepared to endorse decisions such as Lochner v. New York, 198 U.S. 45 (1905), Adair v. United States, 208 U.S. 161 (1908), and Adkins v. Children's Hospital, 261 U.S. 525 (1923). Lochner struck down a New York labor law limiting the hours of bakery employees to 60 per week, Adair invalidated a federal law prohibiting interstate railroads from requiring that its employees agree as a condition of employment not to participate in labor organizations, and Adkins held unconstitutional a

District of Columbia law requiring the payment of a minimum wage. The reasoning in Adair is representative of the Court's substantive due process approach:

> [I]t is not within the function of government [to] compel any person in the course of his business [to] retain the personal services of another. [The] right of a person to sell his labor upon such terms as he deems proper [is] the same as the right of the purchaser of labor to prescribe the conditions. [T]he employer and employe[e] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract.

Although the constitutional right created in these cases is the right to contract, the Court's analysis could easily be substituted for that employed in Griswold simply by replacing "the liberty of contract" with "the right to privacy."

Regardless of his personal preferences, Judge Bork approves of neither form of substantive due process, stating that the doctrine "is and always has been" improper, and that "Griswold's antecedents were also wrongly decided." "With some of these cases I am in political agreement, and perhaps [the] result [in Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating an Oregon law requiring children to attend public schools)] could be reached on acceptable grounds, but there is no justification for the Court's methods." Neutral Principles, 47 Ind. L.J. at 11.

Today's debate over the legitimacy of the Supreme Court's creation of new constitutional rights is remarkably similar to the debate of the Lochner era. For instance, in 1937, Assistant Attorney General (later Justice) Robert H. Jackson charged that many of the Supreme Court's decisions were rooted not in the Constitution, but in "the reactionary personal views of individual Supreme Court justices":

> Let us squarely face the fact that today we have two Constitutions. One was drawn and adopted by our forefathers as an instrument of statesmanship and as a general guide to the distribution of powers and the organization of government. . . . The second Constitution is the one adopted from year to year by the judges in their decisions. . . . The due process clause has been the chief means by which the judges have written a new Constitution and imposed it upon the American people.

In short, Judge Bork's judicial philosophy is that of Justices Robert Jackson and Hugo Black: without a clear constitutional warrant, judges may not displace the considered judgments of elected officials.

INTENTIONALISM AS EXPLAINED IN OLLMAN v. EVANS

In responding to Judge Scalia's dissent in Ollman v. Evans, 717 F.2d 568 (1984) (en banc), Judge Bork describes the mode of reasoning applied in intentionalism. It is clear from his discussion that Judge Bork's intentionalism does not, as some have contended, require a wooden view of the Constitution, to be applied only in situations where the Framers would have applied it. Instead, he views the Framers as having adopted certain core principles in the Constitution, and he believes that the role of the judge is to make a fair application of these core principles to modern situations. Because of the completeness of the exposition of his views in Ollman, and its potential value in determining how Judge Bork views the process of reasoning as an intentionalist, it appears worthwhile to set forth the following lengthy passage from his opinion:

> "Judge Scalia's dissent implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. But most doctrine is merely the judge-made superstructure that implements basic constitutional principles. There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this court along other lines than that of the division in this case. When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision--such as the first amendment--whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges--and certainly no office for a philosophy of judging--if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy. The commerce power was established by men who did not foresee the scope and intricate interdependence of today's economic activities. But that does not make it wrong for judges to forbid states the power to impose burdensome regulations on the interstate movement of trailer trucks. The first amendment's guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the first amendment relevant to radio and television broadcasting.

"So it is with defamation actions. We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of those clauses. Perhaps the framers did not envision libel actions as a major threat to that freedom. I may grant that, for the sake of the point to be made. But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines? Why it is different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media? I do not believe there is a difference. To say that such matters must be left to the legislature is to say that changes in circumstances must be permitted to render constitutional guarantees meaningless.

"We must never hesitate to apply old values to new circumstances, whether those circumstances are changes in technology or changes in the impact of traditional common law actions. Sullivan was an instance of the Supreme Court doing precisely this, as Brown v. Board of Education, 347 U.S. 483, 492-95, 74 S. Ct. 686, 690-92, 98 L.Ed. 843 (1954), was more generally an example of the Court applying an old principle according to a new understanding of a social situation. The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint. The evolution I suggest does not constitute a major change in doctrine but is, as will be shown, entirely consistent with the implications of Supreme Court precedents.

"We now face a need similar to that which courts have met in the past. Sullivan, for reasons that need not detain us here, seems not to have provided the full measure of protection for the marketplace of ideas that it was designed to do. Instead in the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as

effectively inhibit debate and criticism as would overt government regulation that the first amendment most certainly would not permit. . . . It is not merely the size of the damage awards but an entire shift in the application of libel laws that raises problems for press freedoms. . . . Taking such matters into account is not, as one dissent suggests, to engage in sociological jurisprudence, at least not in the improper sense. Doing what I suggest here does not require courts to take account of social conditions or practical considerations to any greater extent than the Supreme Court has routinely done in such cases as Sullivan. Nor does the analysis even approach the degree to which the Supreme Court quite properly took such matters into account in Brown, 347 U.S. at 492-95, 74 S. Ct. at 690-92.

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MACMILLAN PUBLISHING COMPANY
A Division of Macmillan, Inc.
NEW YORK

Collier Macmillan Publishers
LONDON

JUDICIAL REVIEW AND DEMOCRACY

The American ideal of democracy lives in constant tension with the American ideal of JUDICIAL REVIEW in the service of individual liberties. It is a tension that sometimes erupts in crisis. THOMAS JEFFERSON planned a campaign of IMPEACHMENTS to rid the bench, and particularly the Supreme Court, of Federalist judges. The campaign collapsed when the impeachment of Associate Justice SAMUEL CHASE failed in the Senate. FRANKLIN D. ROOSEVELT, frustrated by a Court majority that repeatedly struck down New Deal economic measures, tried to "pack" the Court with additional Justices. That effort was defeated in Congress, though the attempt may have persuaded some Justices to alter their behavior. In recent years there have been movements in Congress to deprive federal courts of JURISDICTION over cases involving such matters as abortion, SCHOOL BUSING, and school prayer (see RELIGION IN PUBLIC SCHOOLS)—topics on which the Court's decisions have angered strong and articulate constituencies.

The problem is the resolution of what Robert Dahl called the Madisonian dilemma. The United States was founded as a Madisonian system, one that allows majorities to govern wide and important areas of life simply because they are majorities, but that also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty.

It is not at all clear that the Founders envisaged a leading role for the judiciary in the resolution of this dilemma, for they thought of the third branch as relatively insignificant. Over time, however, Americans have come to assume that the definition of majority power and minority freedom is primarily the function of the judiciary, most particularly the function of the Supreme Court. This assumption places a great responsibility upon constitutional theory. America's basic method of policymaking is majoritarian. Thus, to justify exercise of a power to set at naught the considered decisions of elected representatives, judges must achieve, in ALEXANDER BICKEL's phrase, "a rigorous general accord between JUDICIAL SUPREMACY and democratic theory, so that the boundaries of the one could be described with some precision in terms of the other." At one time, an accord was based on the understanding that judges followed the intentions of the Framers and ratifiers of the Constitution, a legal document enacted by majorities, though subject to alteration only by supermajorities. A conflict between democracy and judicial review did not arise because the respective areas of each were specified and intended to be inviolate. Though this obedience to original intent was occasionally more pretense than reality, the accord was achieved in theory, and that theory stated an ideal to which courts were expected to conform. That is no longer so. Many judges and scholars now believe that the courts' obligations to intent are so highly generalized and remote that judges are in fact free to create the Constitution they think appropriate to today's society. The result is that the accord no longer stands even theoretically. The increasing perception that this is so raises the question of what elected officials can do to reclaim authority they regard as wrongfully taken by the judiciary.

There appear to be two possible responses to a judiciary that has overstepped the limits of its legitimate authority. One is political, the other intellectual. It seems tolerably clear that political responses are of limited usefulness, at least in the short run. Impeachment and Court-packing, having failed in the past, are unlikely to be resorted to again. Amending the Constitution to correct judicial overreaching is such a difficult and laborious process (requiring either two-thirds of both houses of Congress or an application for a convention by the legislatures of two-thirds of the states, followed, in either case, by ratification by three-fourths of the states) that it is of little practical assistance. It is sometimes proposed that Congress deal with the problem by removing federal court jurisdiction, using the exceptions clause of Article III of the Constitution in the case of the Supreme Court. The constitutionality of this approach has been much debated, but, in any case, it will often prove not feasible. Removal of all federal court jurisdiction would not return final power either to Congress or to state legislatures but to fifty state court systems. Thus, a

a practical matter, this device could not be used as to any subject where national uniformity of constitutional law is necessary or highly desirable. Moreover, jurisdiction removal does not vindicate democratic governance, for it merely shifts ultimate power to different groups of judges. Democratic responses to judicial excesses probably must come through the replacement of judges who die or retire with new judges of different views. But this is a slow and uncertain process, the accidents of mortality being what they are and prediction of what new judges will do being so perilous.

The fact is that there exist few, if any, usable and effective techniques by which federal courts can be kept within constitutional bounds. A Constitution that provides numerous CHECKS AND BALANCES between President and Congress provides little to curb a judiciary that expands its powers beyond the allowable meaning of the Constitution. Perhaps one reason is that the Framers, though many of them foresaw that the Supreme Court would review laws for constitutionality, had little experience with such a function. They did not remotely foresee what the power of judicial review was capable of becoming. Nor is it clear that an institutional check—such as Senator ROBERT LA FOLLETTE's proposal to amend the Constitution so that Congress could override a Supreme Court decision by a two-thirds majority—would be desirable. Congress is less likely than the Court to be versed in the Constitution. La Follette's proposal could conceivably wreak as much or more damage to the Court's legitimate powers as it might accomplish in restraining its excesses. That must be reckoned at least a possibility with any of the institutional checks just discussed and is probably one of the reasons that they have rarely been used. In this sense, the Court's vulnerability is one of its most important protections.

If a political check on federal courts is unlikely to succeed, the only rein left is intellectual, the widespread acceptance of a theory of judicial review. After almost two centuries of constitutional adjudication, we appear to be further than ever from the possession of an adequate theory.

In the beginning, there was no controversy over theory. JOSEPH STORY, who was both an Associate Justice of the Supreme Court and the Dane Professor of Law at Harvard, could write in his *Commentaries on the Constitution of the United States*, published in 1833, that "I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts." He thought that the job of constitutional judges was to interpret: "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties."

The performance of the courts has not always conformed to this interpretivist ideal. In the last decade or so of the nineteenth century and the first third of the twentieth the Supreme Court assiduously protected economic liberties from federal and state regulation, often in ways that could not be reconciled with the Constitution. The case that stands as the symbol of that era of judicial adventurism is LOCHNER V. NEW YORK (1905), which struck down the state's law regulating maximum hours for bakers. That era ended when Franklin D. Roosevelt's appointments remade the Court, and *Lochner* is now generally regarded as discredited.

But, if the Court stopped defending economic liberties without constitutional justification in the mid-1930s, it began in the mid-1950s to make other decisions for which it offered little or no constitutional argument. It had been generally assumed that constitutional questions were to be answered on grounds of historical intent, but the Court began to make decisions that could hardly be, and were not, justified on that basis. Existing constitutional protections were expanded and new ones created. Sizable minorities on the Court indicated a willingness to go still further. The widespread perception that the judiciary was recreating the Constitution brought the tension between democracy and judicial review once more to a state of intellectual and political crisis.

Much of the new judicial power claimed cannot be derived from the text, structure, or history of the Constitution. Perhaps because of the increasing obviousness of this fact, legal scholars began to erect new theories of the judicial role. These constructs, which appear to be accepted by a majority of those who write about constitutional theory, go by the general name of noninterpretivism. They hold that mere interpretation of the Constitution may be impossible and is certainly inadequate. Judges are assigned not the task of defining the meanings and contours of values found in the historical Constitution but rather the function of creating new values and hence new rights for individuals against majorities. These new values are variously described as arising from "the evolving morality of our tradition," our "conventional morality" as discerned by "the method of philosophy," a "fusion of constitutional law and moral theory," or a HIGHER LAW of "unwritten NATURAL RIGHTS." One author has argued that, since "no defensible criteria" exist "to assess theories of judicial review," the judge

should enforce his conception of the good. In all cases, these theories purport to empower judges to override majority will for extraconstitutional reasons.

Judges have articulated theories of their role no less removed from interpretation than those of the noninterpretivist academics. Writing for the Court in GRISWOLD V. CONNECTICUT (1965), Justice WILLIAM O. DOUGLAS created a constitutional RIGHT OF PRIVACY that invalidated the state's law against the use of contraceptives. He observed that many provisions of the BILL OF RIGHTS could be viewed as protections of aspects of personal privacy. These provisions were said to add up to a zone of constitutionally secured privacy that did not fall within any particular provision. The scope of this new right was not defined, but the Court has used the concept in a series of cases since, the most controversial being ROE V. WADE (1973). (See JUDICIAL ACTIVISM AND SELF-RESTRAINT.)

A similar strategy for the creation of new rights was outlined by Justice WILLIAM J. BRENNAN in a 1985 address. He characterized the Constitution as being pervasively concerned with human dignity. From this, Justice Brennan drew a more general judicial function of enhancing human dignity, one not confined by the clauses in question and, indeed, capable of nullifying what those clauses reveal of the Framers' intentions. Thus, the address states that continued judicial tolerance of CAPITAL PUNISHMENT causes us to "fall short of the constitutional vision of human dignity." For that reason, Justice Brennan continues to vote that capital punishment violates the Constitution. The potency of this method of generalizing from particular clauses, and then applying the generalization instead of the clauses, may be seen in the fact that it leads to a declaration of the unconstitutionality of a punishment explicitly assumed to be available three times in the Fifth Amendment to the Constitution and once again, some seventy-seven years later, in the FOURTEENTH AMENDMENT. By conventional methods of interpretation, it would be impossible to use the Constitution to prohibits that which the Constitution explicitly assumes to be lawful.

Because noninterpretive philosophies have little hard intellectual structure, it is impossible to control them or to predict from any inner logic or principle what they may require. Though it is regularly denied that a return to the judicial function as exemplified in *Lochner v. New York* is underway or, which comes to the same thing, that decisions are rooted only in the judges' moral predilections, it is difficult to see what else can be involved once the function of searching for the Framers' intent is abandoned. When constitutional adjudication proceeds in a noninterpretive manner, the Court necessarily imposes new values upon the society. They are new in the sense that they cannot be derived by interpretation of the historical Constitution. Moreover, they must rest upon the moral predilections of the judge because the values come out of the moral view that most of us, by definition (since we voted democratically for a different result), do not accept.

This mode of adjudication makes impossible any general accord between judicial supremacy and democratic theory. Instead, it brings the two into head-on conflict. The Constitution specifies certain liberties and allocates all else to democratic processes. Noninterpretivism gives the judge power to invade the province of democracy whenever majority morality conflicts with his own. That is impossible to square either with democratic theory or the concept of law. Attempts have, nonetheless, been made to reconcile, or at least to mitigate, the contradiction. One line of argument is that any society requires a mixture of principle and expediency, that courts are better than legislatures at discerning and formulating principle, and hence may intervene when principle has been inadequately served by the legislative process. Even if one assumes that courts have superior institutional capacities in this respect, which is by no means clear, the conclusion does not follow. By placing certain subjects in the legislative arena, the Constitution holds that the tradeoff between principle and expediency we are entitled to is what the legislature provides. Courts have no mandate to impose a different result merely because they would arrive at a tradeoff that weighed principle more heavily or that took an altogether different value into account.

A different reconciliation of democracy and noninterpretive judicial review begins with the proposition that the Supreme Court is not really final because popular sentiment can in the long run cause it to be overturned. As we know from history, however, it may take decades to overturn a decision, so that it will be final for many people. Even then an overruling probably cannot be forced if a substantial minority ardently supports the result.

To the degree, then, that the Constitution is not treated as law to be interpreted in conventional fashion, the clash between democracy and judicial review is real. It is also serious. When the judiciary imposes upon democracy limits not to be found in the Constitution, it deprives Americans of a right that is found there, the right to make the laws to govern themselves. Moreover, as courts intervene more frequently to set aside majoritarian outcomes, they teach the les-

son that democratic processes are suspect, essentially unprincipled and untrustworthy.

The main charge against a strictly interpretive approach to the Constitution is that the Framers' intentions cannot be known because they could not foresee the changed circumstances of our time. The argument proves too much. If it were true, the judge would be left without any law to apply, and there would be no basis for judicial review.

But that is not what is involved. From the text, the structure, and the history of the Constitution we can usually learn at least the core values the Framers intended to protect. Interpreting the Constitution means discerning the principle the Framers wanted to enact and applying it to today's circumstances. As John Hart Ely put it, interpretivism holds that "the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground."

This, of course, requires that constitutional DOCTRINE evolve over time. Most doctrine is merely the judge-made superstructure that implements basic constitutional principles, and, because circumstances change, the evolution of doctrine is inevitable. The FOURTH AMENDMENT was framed by men who did not foresee electronic surveillance, but judges may properly apply the central value of that amendment to electronic invasions of personal privacy. The difference between this method and that endorsed by Justices Douglas and Brennan lies in the level of generality employed. Adapting the Fourth Amendment requires the judge merely to recognize a new method of governmental search of one's property. The Justices, on the other hand, create a right so general that it effectively becomes a new clause of the Constitution, one that gives courts no guidance in its application. Modifying doctrine to preserve a value already embedded in the Constitution is an enterprise wholly different in nature from creating new values.

The debate over the legitimate role of the judiciary is likely to continue for some years. Noninterpretivists have not as yet presented an adequate theoretical justification for a judiciary that creates rather than interprets the Constitution. The task of interpretation is often complex and difficult, but it remains the only model of the judicial role that achieves an accord between democracy and judicial review.

ROBERT H. BORK

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STATISTICAL ANALYSIS OF JUDGE BORK'S VOTING RECORD

This memorandum reflects an analysis of every case in which Judge Bork participated while a member of the United States Court of Appeals for the District of Columbia Circuit. The analysis includes 423 appellate cases and 3 cases where Judge Bork sat as a trial judge on a three judge panel.

As the following analysis will demonstrate, Judge Bork is an open-minded judge who is well within the mainstream of contemporary jurisprudence. He has agreed with the other judges on the D.C. Circuit -- including what some would consider to be both "liberal" and "conservative" judges -- in an overwhelming majority of the cases. In fact, the statistics prove that Judge Bork voted with the majority in over 94% of those cases.

Judge Bork's record on appeal is impeccable. The Supreme Court has never reversed any of the majority opinions written by Judge Bork, which total over 100. Indeed, the Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined in one way or another. Moreover, in a number of cases where Judge Bork dissented, the Supreme Court has adopted Judge Bork's view as its own. Justice Powell, in particular, has agreed with Judge Bork in 9 of 10 relevant cases that went to the Supreme Court, agreeing and disagreeing with Judge Bork on various issues in the other case.

These statistics concerning Judge Bork's voting record demonstrate that Judge Bork is precisely the kind of judge that President Reagan has described him to be -- "a fair-minded jurist who believes his role is to interpret the law, not make it."

I. JUDGE BORK'S VOTING RECORD VIS-A-VIS OTHER JUDGES

A study of Judge Bork's voting record in all of the cases in which he participated (except for cases concerning motions for rehearing, which do not directly involve the merits of the case) reveals that Judge Bork agrees with his colleagues the great majority of the time.

For example, the statistics show that Judge Bork has voted with Judge Scalia -- who was confirmed by the Senate for the Supreme Court last year -- 98% of the time. Judge Bork voted with Judge Ruth Bader Ginsburg almost as often -- 90% of the time. Indeed, Judge Bork voted together with Judge J. Skelly Wright -- who some view as one of the most "liberal" judges on the D.C. Circuit -- 74% of the time. Table A on the following page provides a fuller account of the statistics in this regard with respect to various judges.

TABLE A

Other Judge	Total Cases	Voted With Bork	Voted Against
Scalia	86	84 -- 98%	2 -- 2%
R. Ginsburg	82	74 -- 90%	8 -- 10%
Wald	86	68 -- 79%	18 -- 21%
Mikva	84	70 -- 83%	14 -- 17%
Edwards	102	82 -- 80%	20 -- 20%
Wright	70	52 -- 74%	18 -- 26%

II. JUDGE BORK'S VOTING RECORD VIS-A-VIS JUSTICE POWELL

Statistics concerning how many times Justice Powell has agreed with Judge Bork's position in D.C. Circuit cases that went to the Supreme Court show a remarkable identity between Justice Powell's views and those of Judge Bork. In the 10 such cases that have occurred to date, Justice Powell "agreed" with Judge Bork 9 times, or 90% of the time. In the other case, or 10% of the time, Justice Powell agreed with Judge Bork on some issues and disagreed with him on others. A list of the relevant cases is attached to this memorandum as Appendix A.

III. JUDGE BORK'S MAJORITY/DISSENT VOTING RECORD

Statistics concerning how many times Judge Bork voted with the majority or the dissent confirm that Judge Bork is well within the mainstream of contemporary jurisprudence. As the following statistics demonstrate, Judge Bork voted with the majority in over 94% of the cases in which he participated, including cases concerning motions for rehearing.

TABLE B

Total Cases 426

Total Cases in Majority . . . . . 401 -- 94% of total cases

Majority Opinions (Author). . . . 106 -- 25% of total cases

Joined Majority . . . . . 295 -- 69% of total cases

Total Cases in Dissent
(includes full dissents and
dissents in part) . . . . . 25 -- 6% of total cases

IV. JUDGE BORK'S RECORD ON APPEAL

Judge Bork's record on appeal has been flawless. In the 106 majority opinions he has written, he has never been reversed by the Supreme Court. Perhaps even more remarkably, of the 401 cases in which Judge Bork joined the majority, none were reversed by the Supreme Court, and only one was reversed by the D.C. Circuit en banc. In addition, in a number of cases where Judge Bork dissented, either the D.C. Circuit en banc or the Supreme Court eventually adopted Judge Bork's position.

TABLE C

Total Cases	426
Majority Opinions (Author)	
Number of cases	106 -- 25% of total
Reversed by Supreme Court	0
Reversed by D.C. Circuit en banc	1 [1/]
Total Majority Opinions Joined	
Number of cases	401 -- 94% of total
Reversed by Supreme Court	0
Reversed by D.C. Circuit en banc	1 (see footnote 1 below)
Dissenting Opinions (Authored or Joined)	
Number of cases	25 -- 6% of total
Adopted by Supreme Court	6 (see Appendix A)
Adopted by D.C. Circuit en banc	1 [2/]

1/ See Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc).

2/ See Jersey Central Power and Light Co. v. FCC, 810 F.2d 1168 (D.C. Cir. 1987) (en banc).

V. CONCLUSION

The foregoing statistics provide impressive support for President Reagan's statement that "[a]s a member of the U.S. Court of Appeals, Judge Bork has always heard each case with an open mind, following the law and legal precedent, not his personal preferences." As those statistics demonstrate, Judge Bork is the model of a principled and open-minded judge.

APPENDIX A

Cases in Which Justice Powell Agreed with Judge Bork

1. Goldman v. Secretary of Defense, 739 F.2d 657 (D.C. Cir. 1984), aff'd sub nom. Goldman v. Weinberger, 475 U.S. 503 (1986) -- Bork concurred in D.C. Circuit's denial of rehearing en banc below.

2. National Association of Retired Federal Employees v. Horner, 633 F. Supp. 511 (D.D.C. 1986), aff'd 107 S. Ct. 261 (1986) -- Bork joined a per curiam majority of three judges below.

3. Chaney v. Heckler, 724 F.2d 1030 (D.C. Cir. 1984) (denial of rehearing en banc), rev'd 470 U.S. 821 (1985) -- Joined Scalia dissent from denial of rehearing en banc below.

4. Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir. 1983), rev'd sub nom. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) -- Bork joined two dissenting opinions below.

5. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (D.C. Cir. 1985), rev'd sub nom. Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986) -- Bork dissented below.

6. Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694 (D.C. Cir. 1985), rev'd sub nom. United States Department of Transportation v. Paralyzed Veterans of America, 106 S. Ct. 2705 (1986) -- Bork dissented from denial of rehearing en banc below.

7. Hohri v. United States, 793 F.2d 304 (D.C. Cir. 1986), vacated, 55 U.S.L.W. 4716 (U.S. 1987) -- Bork dissented below.

8. Sims v. CIA, 709 F.2d 95 (D.C. Cir. 1983), aff'd in part, rev'd in part 471 U.S. 159 (1985) -- Bork concurred in part and dissented in part below.

9. Vinson v. Taylor, 760 F.2d 1330 (D.C. Cir. 1985), aff'd and remanded sub nom. Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986) -- Bork dissented from the denial of rehearing en banc below.

Case in Which Justice Powell Agreed and Disagreed with Judge Bork

1. Securities Industry Ass'n v. Comptroller of the Currency, 765 F.2d 1196 (D.C. Cir. 1985), aff'd in part, rev'd in part sub nom. Clarke v. Securities Industry Ass'n, 107 S. Ct. 750 (1987) -- Bork joined a Scalia opinion dissenting from the denial of rehearing en banc below.

NOTE: In a D.C. Circuit case that did not go to the Supreme Court, Judge Bork joined an opinion written by Judge Wald for all members of the court (except Judge MacKinnon, who concurred specially) that was later disapproved by the Supreme Court in a case in which Justice Powell joined the majority. See United States v. Lipscomb, 702 F.2d 1049 (D.C. Cir. 1983) (en banc), disapproved in Luce v. United States, 469 U.S. 38 (1984).